

earned vested seniority rights which endured after the termination in good faith of the agreement under which provision was made therefor and after termination in good faith of the employment of respondents.

Chief Judge Lumbard dissented, stating that the agreement did not provide that the employees had the right to "follow the work" to the new site and that seniority rights did not endure beyond the termination of the collective bargaining agreement. 288 F. 2d at page 105.¹

Summary of Petitioner's Argument.

Petitioner's argument is summarized as follows:

1. *The characteristics of the Court of Claims establish it as an Article I or Legislative Court as distinguished from an Article III Court vested with the Judicial Power of the United States.*

The nature and character of a court are determined by the functions and powers granted to it.

In Article I of the Constitution of the United States there are enumerated the legislative powers exclusively granted to Congress. Some of these powers are delegable to agencies, boards, commissions, corporations or courts which may be created by Congress as " * * * necessary and proper for carrying into Execution the foregoing Powers * * *."

Such agencies, boards, commissions, corporations or courts, as instrumentalities of Congress in carrying out the powers granted to it by Article I, may be eliminated by Congress at any time in its discretion, and the powers so

¹ See, Columbia Law Review, Vol. 61, No. 7, at pages 1363 *et seq.* (November, 1961).

delegated may be performed by other instrumentalities selected by Congress, or Congress may determine to exercise these powers directly without the use of any instrumentality.

The functions and powers of the Court of Claims, set forth in sections 1491, 1492, 1494 to 1505, 2509 and 2510 of Title 28 of the United States Code, are distinctly functions and powers which among others have been granted by Article I exclusively to Congress.

These functions and powers so granted to the Court of Claims by Congress establish its character as an Article I court performing legislative functions and powers under Article I, as an instrumentality of Congress.

The Court of Claims having been granted only functions and powers of Congress under Article I is an Article I or legislative court.

Section 1 of Article III of the Constitution provides that

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *”

Section 2 of Article III enumerates and limits the types of cases and controversies with reference to which the judicial functions and powers of the United States shall be extended.

The Court of Appeals for the Second Circuit is concededly an Article III court vested with the function and power to hear and determine cases or controversies enumerated in section 2 of Article III.

The functions and powers of the Supreme Court as established by the Constitution and of the inferior courts created by Congress under Article III are clearly judicial and not legislative.

2. *The participation by Judge Madden in the hearing and determination of the appeal in the Court of Appeals for the Second Circuit vitiated the judgment of that court.*

To attempt to authorize a judicial court composed of a judge or judges of an Article I legislative court to hear and determine common law cases or controversies where a diversity of citizenship appears offends and violates Article III of the Constitution and Amendment V thereto.

Section 1 of Article III provides that the judges of the Supreme Court and of such inferior courts as Congress may from time to time ordain and establish

“shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

By reason of this provision in section 1 of Article III the Congress is without power to alter the tenure of office of such judges of Article III courts during their good behaviour, and without power to diminish their compensation during their continuance in office.

There is no equivalent provision in Article I pertaining to the members of such agencies, boards, commissions, corporations or courts which might be created by Congress to assist it in performing its legislative functions and powers.

Such provision is made in Article III of the Constitution in order to create an independent judiciary and thereby maintain a separation of powers as contemplated by the Constitution.

The Court of Appeals for the Second Circuit because of the participation of Judge Madden of the Court of Claims, a court created under the legislative powers of

Congress, was an improperly constituted court and accordingly lacked jurisdiction and power to determine this appeal, and its judgment is vitiated and a nullity.

The parties to this case are entitled under Amendment V to have a controversy of the type before this Court heard and determined by a court composed of judges possessing the functions and powers of an Article III court. Otherwise, they are deprived of their "property without due process of law."

The question of jurisdiction of the Court of Appeals may be raised at any time in this proceeding.

Argument.

On January 7, 1941, President Franklin D. Roosevelt issued a commission to Judge Madden reading as follows:

"PRESIDENT OF THE UNITED STATES OF AMERICA

"To all who shall see these Presents, Greeting:

"KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Joseph Warren Madden, of Pennsylvania, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Judge of the United States Court of Claims, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Joseph Warren Madden, during his good behavior.

"In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

"Done at the City of Washington this seventh day of January, in the year of our Lord one thousand

nine hundred and forty one, and of the Independence of the United States of America the one hundred and sixty fifth."

By the President:

Franklin D. Roosevelt

Robert H. Jackson
Attorney General.

Judge Madden was sworn in and entered upon his duties as Judge of the United States Court of Claims on January 8, 1941, and continued to perform such duties to and beyond the time of his participation in the hearing and determination of the appeal argued before the United States Court of Appeals for the Second Circuit on February 8, 1961.

On January 25, 1961, Honorable Earl Warren, Chief Justice of the United States, in a designation and assignment² filed with the Clerk of the Court of Appeals on January 27, 1961, stated in part:

"Now, therefore, pursuant to the authority vested in me by Title 28, United States Code, §293(a), I do hereby designate and assign the Honorable J. Warren Madden to serve as a Circuit Judge of the Court of Appeals for the Second Circuit for the period aforesaid [commencing February 6, 1961 and ending February 11, 1961], and for such further time as may be required to complete unfinished business."

² See appendix, page 8a.

I.

The characteristics of the Court of Claims establish it as an Article I or Legislative Court as distinguished from an Article III Court vested with the Judicial Power of the United States.

a. The functions and the powers of the Court of Claims establish it as an Article I or legislative court.

The functions and the powers of the Court of Claims of the United States are provided for in sections 1491, 1492, 1494 to 1505, 2509 and 2510 of Title 28 of the United States Code (see appendix, pages 5a to 7a).

Article I of the Constitution of the United States provides in section 1 thereof "All legislative Powers herein granted shall be vested in a Congress of the United States, * * *." And in section 8 thereof "The Congress shall have Power * * * to pay the Debts * * * of the United States; * * *,"

It will be noted that the Court of Claims has the functions and the power under sections 1492 and 2509 to report to Congress the facts of a case referred to it by Congress in any bill, except a bill for a pension, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed or facts claimed to excuse the claimants for not having resorted to any established legal remedy. It may report also to either House of Congress conclusions sufficient "to inform Congress whether the demand is legal or equitable or a gratuity."³

³ Of course, under Article III a court does not have the function or the power to make reports to Congress as contemplated by sections 1492 and 2509 of Title 28 of the United States Code, or to exercise any other function or power of a non-judicial nature. See, e.g. *Muskrat v. United States*, 219 U. S. 346 (1911). Also, cf. section 2510 of Title 28 of the United States Code.

From the foregoing statement of the functions and the powers of the Court of Claims it is clear that its character is that of a body created to act as an arm of Congress in the performance of its legislative functions and powers and not that of an independent judicial court under Article III of the Constitution.

It is clear that the Court of Claims does not have the function or the power to determine a controversy of the nature of the case before this Court. Therefore, a judge of the Court of Claims does not have the function or the power to participate in the hearing and determination of this controversy.

b. This Court has held squarely that the Court of Claims is an Article I or legislative court.

The distinction between Article I and Article III courts was first noted by Chief Justice Marshall in *American Insurance Co. v. Canter*, 1 Pet. 511 (1828). It was there emphasized that Article I courts "were incapable of receiving" any of the judicial power of the United States stemming from Article III of the Constitution with which Article III courts were vested.

In *Williams v. United States*, 289 U. S. 553 (1933), in an unanimous opinion, this Court held squarely that the United States Court of Claims is a court created pursuant to Article I of the Constitution and as such the judges of that court are not protected by the provisions of Article III of the Constitution relating to tenure of office and compensation. In reaching its decision in the *Williams* case, this Court relied heavily upon the ruling in *Ex parte Bakelite Corp.*,⁴ 279 U. S. 438 (1929), which held that the United States Court of Customs Appeals was an Article I court.

⁴ In *Bakelite* the petitioner sought a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from the findings of the Tariff Commissioner. It was held that the Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties.

In *Williams* it was pointed out at page 565:

“* * * that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. * * * The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.”

At pages 568, 569, Mr. Justice Sutherland, speaking for the Court, quoted from the opinion of this Court in *Bakelite*:

“It [the Court of Claims] was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.”

Mr. Justice Sutherland noted there that this Court in *Bakelite* pointed out that the Court of Claims is, and always has been

“* * * as Congress declared at the outset, ‘a court for the investigation of claims against the United States’; that none of the matters made cognizable by the court inherently or necessarily requires judicial determination, but on the contrary ‘all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Con-

gress.' It is noted as significant that the act constituting the court dispenses with trial by jury, a provision which was distinctly upheld in spite of the Seventh Amendment in *McElrath v. United States*, 102 U. S. 426."

This Court in *Williams* stated at page 580:

"And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. * * *"

And, in concluding his opinion, Mr. Justice Sutherland stated at page 581:

"From whatever point of view the question be regarded, the conclusion is inevitable that the Court of Claims receives no authority and its judges no rights from the judicial article of the Constitution, but that the court derives its being and its powers and the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions."⁵

⁵ Expressions contained in earlier opinions of this Court were rejected unanimously in *Williams*. "None of these cases involved the question now under consideration, and the expressions referred to were clearly *obiter dicta*, which, as said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, 'may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" See page 568.

On the same day this Court decided *Williams, O'Donoghue v. United States*, 289 U. S. 516 (1933) was decided. *Bakelite* was recognized in the majority and dissenting opinions in *O'Donoghue* as correctly decided.

Each of the four opinions in *National Mutual Life Insurance Co. v. Tidewater Transfer Co., Inc.*,⁶ 337 U. S. 582, decided in 1949, recognized that *Williams* was correctly decided and relied upon it in part in arriving at the respective conclusions.

c. The declaration by Congress that the Court of Claims is an Article III court is ineffectual.

Section 171 of Title 28 of the United States Code was amended on July 28, 1953, 67 Stat. 226 by the addition of the last sentence contained therein

“The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States.”

The functions and the powers of the Court of Claims provided for in sections 1491, 1492, 1494 to 1505, 2509 and 2510 are distinctly functions and powers, which among others, have been granted by Article I exclusively to Congress. That court does not possess the function or the power to hear and determine the cases and controversies referred to in section 2 of Article III of the Constitution.

⁶ In *Tidewater*, a District of Columbia corporation instituted in the Federal District Court for Maryland an action against a Virginia corporation wherein jurisdiction depended solely on diversity of citizenship. The Supreme Court held the Act which confers jurisdiction on federal district courts over civil actions between citizens of the District of Columbia and citizens of a State to be constitutional.

The amendment to section 171 of Title 28 of the U. S. Code on July 28, 1953, cannot be construed to grant to the Court of Claims the function and the power to hear and determine cases and controversies of the types provided for in section 2 of Article III. The jurisdiction, the function and the power of the Court of Claims have not been changed.⁷

If it was the intent of the Congress to create the Court of Claims under Article III of the Constitution of the United States, then the Congress must have granted to the Court of Claims and its judges the function and the power to hear and determine all cases in law and equity arising under the Constitution, the laws of the United States and treaties made or which shall be made under their authority; all cases of admiralty and maritime jurisdiction;—*between citizens of different states*;—and between citizens of the same state claiming lands in different states.

But, certainly no court should so construe the declaration of Congress.

The judicial power defined in Article III of the Constitution, however, does not depend upon nor is it derived from the will of Congress; it is expressly and solely vested

⁷ Except the repeal of section 1493 of Title 28 of the United States Code relating to departmental reference cases. It is noted that section 1492 relating to Congressional reference cases was not repealed. The repeal of section 1493 and the retention of section 1492 demonstrate that Congress intentionally, contrary to its declaration, in fact, retained in the Court of Claims a conceded non-judicial function.

The declaration by Congress did not pretend to enlarge the functions and the powers of the Court of Claims. The declaration is not contained in Chapter 29 of Title 28 of the United States Code relating to the jurisdiction of the Court of Claims. Rather, it is contained in Chapter 7 of Title 28 relating to Court of Claims and specifically to section 171 thereof captioned "Appointment and Number of Judges; Character of Court". The "Character of Court" caption was added on September 3, 1954, 68 Stat. 1240.

in virtue of Article III, and in no sense may it be vested in any administrative agency. *Toth v. Quarles*, 350 U. S. 11 (1955).

The action of Congress in 1953 in stating that the Court of Claims "is hereby declared to be a court established under Article III of the Constitution of the United States" was taken without granting any Article III judicial powers to either the court or its judges. The basic character of the court as one organized as an arm of Congress in the exercise of its legislative powers, was unchanged (see footnote ¹³ on page 18).

It is very clear that Congress is completely without power under the Constitution to alter the status of an Article I court *merely* by declaration of intention as to its constitutional status made many years after the court's creation. In other words, a court assumes a definite status at the time of its establishment and, absent changes in the character, function, power or jurisdiction of that court, such status constitutionally does not and can not change. (*Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); *Williams v. United States*, 289 U. S. 553 (1933); *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949).)

House Report No. 695, 83rd Congress, 1st Session, (1953) relating to the amendment to Section 171 of Chapter 7 of Title 28 of the United States Code enacted on July 28, 1953 declaring the United States Court of Claims to be a court established under Article III of the Constitution, states at page 3:

"It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under article III. (See Congressional Globe, 33d Cong., 2d sess., pp. 71, 72, 105-106, 110, 111, 113,

and 114.) On these pages are statements by Senators Brodhead, Hunter, Pratt, Clayton, Douglas, and Stuart, indicating that Congress intended to create a court under the power granted it by article III to create inferior courts."

An examination of the Congressional Globe demonstrates, however, that the Senate debates to which reference was made by no means support the conclusion that the Congress intended to create the Court of Claims under Article III. On the contrary, the debates clearly establish that the court was created to perform the functions and the powers of Congress granted to it by Article I.⁸ (Congressional Globe, 33rd Congress, 2d Session (1854) pp. 106, 107, 110-112.)

Furthermore, any expression on the part of Congress as to whether or not it intended the Court of Claims to be created as an Article I or Article III court is fairly irrelevant when consideration is given to the *acts of Congress in*

⁸ For example, at page 70 of the Congressional Globe, *ibid*, Senator Brodhead, the Chairman of the Committee of Claims and author of the bill, which was also handled by him on the floor of the Senate stated in part:

"Population doubles in this country every 23 or 24 years. The business before Congress, and especially that of a private character, increases in the same ratio. * * * Want of time leads to improper legislation and often to great injustice. Those who have honest claims are postponed for years. Justice is cheated by long delay; * * *. The pressure of business of a private character prevents us from considering great questions in a way becoming statesmen representing this great people, and this extended empire. Our time is too valuable to be occupied in discussing the merits or demerits of a private bill. Frequently, we dispute about the facts of a case prepared in an *ex parte* way, the truth of which could be better ascertained by a tribunal differently constituted."

Also see statements by Senator (later Chief Justice) Salmon P. Chase at page 112; statement by Senator Butler at page 112; and statement by Senator Weller at page 110, Congressional Globe, *ibid*.

creating the Court of Claims as a court to assist in performing the functions and the powers granted by the Constitution to the Congress. The acts of Congress creating the Court of Claims establish that court as a legislative court and not an Article III court.

The status of a court depends not on the intention of Congress but on the function and the power with which the court, in actuality, was vested. Without a change in the functions and the powers or jurisdiction of the court, Congress cannot constitutionally change the fundamental character of an Article I legislative court to that of an Article III court merely by a declaration of intention.

As stated by Mr. Justice Van Devanter in *Bakelite*, 279 U. S. 438 (1928) at page 459:

“It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court [as manifested by the grant of functions and powers] was created and in the jurisdiction conferred.”

It was argued to this Court in *Bakelite* that Congress, in making provision for temporary assignments of circuit and district judges to the Court of Customs Appeals, intended thereby that such court should be a judicial or Article III court, for otherwise such assignments would be inadmissible under the Constitution. In refutation of this argument Mr. Justice Van Devanter speaking for the Court stated at page 460:

“But if there be constitutional obstacles to assigning judges of constitutional [Article III] courts to legislative [Article I] courts, the provision cited is for that reason invalid and cannot be saved on the theory that Congress intended the court [the Court

of Customs Appeals] to be in one class when under the Constitution it belongs in another."

It is a "settled principle that where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. III*, jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in *American Insurance Co. v. Canter, supra*, 'they are incapable of receiving it.' " *Williams v. United States, supra*, at page 578.

It is clear from the foregoing that the Court of Claims is an Article I legislative court. The declaration by Congress in 1953 to the contrary is ineffectual where it appears, as here, that in fact its functions and powers are granted in pursuance of the legislative powers of Congress and not the judicial power of Article III.

d. The distinctions between Article I and Article III courts.

The characteristics of the Court of Claims establish it as an Article I or legislative court. These characteristics demonstrate the fundamental distinctions between the functions and the powers of Article I judges and judges of the judicial courts under Article III. The significant distinction is that the Court of Claims as a legislative court does not exercise any function or power which was not granted in the first instance to the Congress by section 8 of Article I and delegated by Congress to that court. It has not been granted the function and the power to hear and determine cases and controversies which are granted exclusively to Article III courts under section 2 of that Article.

In contrast, Article III courts have the function and power granted to them by Congress under the Constitution to hear and determine cases and controversies enumerated in Section 2 of Article III. Article III courts may not exercise any power or function which in the first instance has been granted to Congress by Article I.

The Court of Claims as a legislative court has the function and the power under Article I to hear and determine cases and controversies to which the United States of America is a defendant. Article III courts in the exercise of the judicial power of the United States also may have the function and the power to hear and determine certain controversies in which the United States of America is a party. The Court of Claims has not been granted the function or the power to hear and determine cases and controversies enumerated in section 2 of Article III.⁹

And, of course, an Article III court clearly does not have the function or power to act with respect to Congressional reference cases. Section 1492 of Title 28 of the United States Code.

In 1953 by amendment to section 171 of Title 28 of the United States Code the following sentence was added to that section by Congress, "The Court of Claims is hereby declared a court established under Article III of the Constitution of the United States." As demonstrated, the Court of Claims is and has been an Article I legislative court and not an Article III court.

⁹ As said by Mr. Justice Vinson in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949) at page 643:

"There is no anomaly, * * * in the fact that legislative [Article I] courts, as well as constitutional [Article III] courts, * * * sometimes exercise concurrent jurisdiction over the same matters. That does not make the former constitutional courts * * *."

In 1956 Congress amended sections 291(a) and added a new subsection (e) to section 292 of Title 28 of the United States Code to provide that the Chief Justice of the United States, upon presentation of a certificate of necessity by the chief judge or circuit justice of any circuit wherein a need arises, may designate and assign temporarily any judge of the Court of Claims to sit in any circuit or district court. In 1958, these provisions were reenacted and consolidated into present section 293(a).

By this legislation in 1956 and 1958 Congress did not change the functions or the powers of the Court of Claims, its legislative instrumentality, or of the judges of that court.

Such legislation constitutionally could not vest Judge Madden with functions or powers to determine cases or controversies enumerated in section 2 of Article III.

II.

The participation by Judge Madden in the hearing and determination of the appeal in the Court of Appeals for the Second Circuit vitiated the judgment of that court.

On January 7, 1941, Judge Madden was appointed a judge of the United States Court of Claims. He was authorized and empowered by that appointment

“* * * to execute and fulfill the duties of that office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the power, privileges and emoluments to the same of right appertaining, unto Him, the said Joseph Warren Madden, during his good behavior.”

The functions and the powers of the Court of Claims are discussed fully in point I hereof. Those functions and powers do not include the functions and power to hear and determine cases or controversies of the type before this Court.

The determination of a court not properly constituted under Article III of the Constitution operates to deprive persons of their property without due process of law in violation of the Amendment V. *Kilbourn v. Thompson*, 103 U. S. 168, 182 (1880).

The Court of Appeals for the Second Circuit hearing and determining the appeal in this case was composed of three judges, two of whom (Chief Judge Lumbard and Circuit Judge Waterman) were vested with the function and power to hear and determine cases and controversies of the type before this court. The third, Judge Madden, was without that function or power.

It has been basic law since Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, 1 Pet. 511 (1828), that Article I courts are "incapable of receiving" Article III judicial power. Or, as stated by this Court in *Williams*, a legislative court "receives no authority and its judges no rights from the judicial article of the Constitution." (289 U. S., at 581).

Certainly, Judge Madden never received any Article III power in virtue of his 1941 appointment, confirmation and subsequent service on the Court of Claims, and he was "incapable of receiving" such power merely in virtue of his *temporary* designation and assignment under section 293(a) of Title 28 of the United States Code to the Court of Appeals for the Second Circuit.

Such *temporary* designation and assignment of an Article I court judge to an Article III court would disregard the constitutional protection provided for Article III judges

in their tenure of office, a protection not constitutionally provided for Article I judges.

Authorizing Article I judges to hear and determine controversies between citizens of different states, such as the controversy before this Court, would allow a judge holding his office for a term or at the will of Congress under Article I, to hear and determine cases or controversies which only judges whose powers are beyond the reach of Congress may hear and determine under Article III of the Constitution.

Accordingly, if Congress is permitted to enact legislation which would authorize the designation and assignment of judges of Article I courts to sit in Article III courts, its action would be in derogation of the separation of powers contained in the Constitution.

The judges participating in the hearing and determination of a case or controversy described in section 2 of Article III are required not only to be vested with the function and power to hear and determine such cases and controversies but also must be independent of, and insulated from, the influence of the legislative branch of Government.

Section 1 of Article III provides for such independence and insulation by constitutionally protecting judges of Article III courts from diminution in tenure of office and compensation.

The Honorable Roger B. Taney, Chief Justice of the United States, in a letter dated February 16, 1863, to Honorable S. P. Chase, Secretary of the Treasury, later Chief Justice of the United States, in connection with an act of Congress imposing a tax on the salaries of all officers in the employment of the United States and the construction placed upon such act by the Secretary of the Treasury to embrace judicial officers, stated

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments." 157 U. S. 701, 702.

Accord: Evans v. Gore, 253 U. S. 245 (1920) at page 257; *Kilbourn v. Thompson*, 103 U. S. 168 (1880) at pages 190-191; *The Federalist*, Nos. 78 and 79 (Hamilton).¹⁰

From the foregoing, it is clear that the Court of Appeals for the Second Circuit did not have the function or the power to hear and determine the appeal argued before it on February 8, 1961, when Judge Madden of the Court of Claims sat by assignment and designation. *United States v. American-Foreign Steamship Corp.*, 363 U. S. 685, 691 (1960); *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132, 141 (1947); *Frad v. Kelly*, 302 U. S. 312, 316-319

¹⁰ See, *The Federalist*, Modern Library Edition, New York, pp. 502 and 512, respectively.

(1937); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 387 (1893).

The jurisdiction of the Court of Appeals, with Judge Madden participating, was lacking.

And of course the question of lack of jurisdiction may be raised at any time in the proceeding. *McGrath v. Kristensen*, 340 U. S. 162, 167 (1950).

As said by Circuit Judge Hicks in *Manning v. Ketcham*, 58 F. 2d 948 (CCA 6th 1932), at page 949:

“When a judge acts in the clear absence of all jurisdiction, i.e., of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function, has become a mere private person, * * *. Such has been the law from the days of the case of *The Marshalsea*, 10 Coke 68. It was recognized as such in *Bradley v. Fisher*, 13 Wall. (80 U. S.) 335, 351, 20 L. Ed. 646. In *State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N. E. 762, 763, the court said:

“* * * Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.”

Where constitutional limitations have not been adhered to, they still are to be applied in all their vigor, without concern for the fate of earlier judgments made by courts improperly constituted and without jurisdiction, function or power to make such judgments.

As stated by Mr. Justice Frankfurter in his dissenting opinion (not in disagreement in this respect with the majority) in *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949) at p. 655:

“* * * If there is one subject as to which this Court ought not to feel inhibited in passing on the validity of legislation by doubts of its own competence to judge what Congress has done, it is legislation

affecting the jurisdiction of the federal courts. When Congress on a rare occasion through inadvertence or generosity exceeds those limitations, this Court should not good-naturedly ignore such a transgression of congressional powers.”¹¹

Constitutional principles relating to the jurisdiction of Article III courts should not be sacrificed “on the altar of expediency”. *National Mutual Insurance Co. v. Tidewater Transfer Co. Inc.*, *supra* at page 645.

Conclusion.

Because of the participation of a judge of an Article I court with two Article III court judges in the hearing and determination of this Article III case by the Court of Appeals for the Second Circuit, the judgment of the Court of Appeals was vitiated and a nullity.

This Court should reverse the judgment of the Court of Appeals for the Second Circuit and remand the case to that court for further proceedings in accordance with law.

Dated: November 30, 1961.

Respectfully submitted,

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¹¹ See the concurring opinion of Mr. Justice Frankfurter in *Griffin v. Illinois*, 351 U. S. 12 (1956) at pp. 25, 26.

APPENDIX.

Constitution of the United States.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

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To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28 of United States Code.

§171. APPOINTMENT AND NUMBER OF JUDGES; CHARACTER OF COURT.

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims.

Such court is hereby declared to be a court established under article III of the Constitution of the United States. As amended July 28, 1953, c. 253, §1, 67 Stat. 226; Sept. 3, 1954, c. 1263, §39(a), 68 Stat. 1240.

§293. JUDGES OF OTHER COURTS.

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

§1491. CLAIMS AGAINST UNITED STATES GENERALLY; ACTIONS INVOLVING TENNESSEE VALLEY AUTHORITY

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of

Title 28 of United States Code.

1933, as amended, with respect to suits by or against the Authority. As amended July 28, 1953, c. 253, §7, 67 Stat. 226; Sept. 3, 1954, c. 1263, §44(a), (b), 68 Stat. 1241.

§1492. CONGRESSIONAL REFERENCE CASES

The Court of Claims shall have jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension, and to render judgment if the claim against the United States represented by the referred bill is one over which the court has jurisdiction under other Acts of Congress. June 25, 1948, c. 646, 62 Stat. 941.

§1494. Accounts of officers, agents or contractors

§1495. Damages for unjust conviction and imprisonment; claim against United States

§1496. Disbursing officers' claims

§1497. Oyster growers, damages from dredging operations

§1498. Patent and copyright cases

§1499. Penalties imposed against contractors under eight hour law

§1500. Pendency of claims in other courts [no jurisdiction]

§1501. Pensions [no jurisdiction]

§1502. Treaty cases [no jurisdiction except as Congress otherwise provides]

§1503. Set-offs [by the United States and judgment in its favor against plaintiffs]

§1504. Tort claims.

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b)

Title 28 of United States Code.

of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims. June 25, 1948, c. 646, 62 Stat. 942.

§1505. Indian claims.

§2509. Congressional Reference Cases.

Whenever any bill, except for a pension, is referred to the Court of Claims by either House of Congress, such court shall proceed with the same in accordance with its rules and report to such House, the facts in the case, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy.

The court shall also report conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

§2510. Referral of cases by Comptroller General.

The Comptroller General may transmit to the Court of Claims for trial and adjudication any claim or matter of which the Court of Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

The Court of Claims shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon. As amended July 28, 1953, c. 253 §11, 67 Stat. 227; Sept. 3, 1954, c. 1263, §47(b), 68 Stat. 1243.

**The Designation and Assignment of Honorable
J. Warren Madden.**

**Designation of a Judge of the United States Court of
Claims for Service on the United States Court of
Appeals for the Second Circuit.**

The Chief Judge of the United States Court of Appeals for the Second Circuit having certified that there is a necessity for the designation and assignment of a Judge of the United States Court of Claims to serve as a Circuit Judge of the United States Court of Appeals for the Second Circuit during the period commencing February 6, 1961 and ending February 11, 1961; and the Honorable Marvin Jones, Chief Judge of the United States Court of Claims, having consented to the assignment of the Honorable J. Warren Madden, a Judge of the United States Court of Claims, to serve as a Circuit Judge of the Court of Appeals for the Second Circuit during the period commencing February 6, 1961 and ending February 11, 1961;

Now, THEREFORE, pursuant to the authority vested in me by Title 28, United States Code, §293(a), I do hereby designate and assign the Honorable J. Warren Madden to serve as a Circuit Judge of the Court of Appeals for the Second Circuit for the period aforesaid, and for such further time as may be required to complete unfinished business.

/s/ EARL WARREN
Chief Justice of the United States

Dated, Washington, D. C.:
Jan. 25, 1961